



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

August 16, 2016
Honolulu, Hawaii

Find that Landowner, Hooululahui LLC, Allegedly Violated Section 174C-93, Hawaii Revised Statutes (HRS) by Installing a Stream Diversion Works Without a Permit; Request the Issuance of Administrative and Civil Penalties of \$4,500 Per HRS §174C-15; Approve a Stream Diversion Works Permit (SDWP.4175.6) Application for Existing Uses; A Petition to Amend the Instream Flow Standard is Not Required Under HRS §174C-71; Wailuku River, Wailuku, Maui, TMK: (2) 3-5-003:018, Nā Wai 'Ehā Water Management Area

LANDOWNER:

Hooululahui LLC
c/o John and Rose Marie Duey
575A 'Īao Valley Road
Wailuku, HI 96793

APPLICANT:

Same

SUMMARY OF REQUEST

That the Commission on Water Resource Management (Commission):

1. Find that the Landowner, Hooululahui LLC, c/o John and Rose Marie Duey (the Landowner or Duey), violated Section 174C-93, Hawaii Revised Statutes (HRS), and Section 13-168-32, Hawaii Administrative Rules (HAR), by installing a stream diversion works without a permit;
2. Issue administrative and civil penalties of \$4,500 against the Landowner pursuant to HRS §174C-15, HAR §13-168-3, and Administrative and Civil Penalty Guideline (G14-01) payable within 30 days;
3. Find that 26,600 gallons per day (gpd), being less than 1% of the mediated interim instream flow standard of dated April 17, 2014, is considered an insubstantial

modification. Therefore, a Petition to Amend Instream Flow Standard is not required under HRS §174C-71 and HAR §13-169-36;

4. Approve a Stream Diversion Works Permit (SDWP.4175.6) Application for a stream diversion works consisting of Driscoll and PVC piping diverting 26,600 gpd of water for existing domestic uses and less than 2 acres of diversified agriculture and taro while returning 22,000 gpd back to the Wailuku River;
5. Issue a written warning to the Dueys indicating any future violations involving a stream diversion without the necessary permits may be considered repeat violations with fines up to \$1,000 for each day of violation; and,
6. Suspend any current, pending or future applications by the applicant until the fines are paid and the applicant completes the stream diversion works permit process.

LOCATION: Tax Map Key (2) 3-5-003:018 of the Landowner showing the location of the intake and where the water returns back to the Wailuku River (also known as the 'Īao Stream) (**Exhibit 1**).

STREAM DESCRIPTION

The Wailuku River is a 8.73-mile long perennial river with numerous tributaries that drain into the ocean north of the Kahului Harbor on Maui. Its drainage area is 12 square miles.

ALLEGED UNPERMITTED USES

Approximately 170-feet of six-inch Driscoll pipe connected to 630-feet of six-inch PVC pipe (**Exhibit 2**). The diversion, installed after 2001, diverts about 26,600 gpd of water for domestic uses and agriculture consisting of banana (0.1 acres), breadfruit (0.06 acres), native plants (0.7 acres), and taro (1.0 acre) while returning 22,000 gpd back to the stream. No Stream Diversion Works Permit is on file with the Commission.

BACKGROUND

On December 10, 2001, the Dueys purchased the subject parcel from Wailuku Agribusiness Company, Inc.

On March 25, 2004, the Commission responded by letter to a request for information from Mr. Duey regarding the Maniania and 'Īao-Waikapū Ditches and the uses Wailuku Agribusiness declared to the Commission in 1989. The letter described the interim instream flow standard for West Maui and stated that a new or expanded diversion from a stream would require a Stream Diversion Works Permit, a Stream Channel Alteration Permit, and an Amendment to the Interim Instream Flow Standard.

In 2004, staff did a site visit regarding a 6-inch pipe in the stream and the Dueys were informed at that time to complete a Stream Diversion Works Permit application.

On June 25, 2004, Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation (Hui/MTF), through Earthjustice, filed a Petition to Amend the Interim Instream Flow Standards for Waihe‘e, North and South Waiehu, ‘Īao, and Waikapu Streams and their Tributaries. Mr. Duey is President of Hui o Nā Wai ‘Ehā.

On July 21, 2004, the Dueys faxed a Surface Water Use Permit Application for 270,000 gpd for their surface water diversion in the Wailuku River for the subject parcel 18.

On July 21, 2004, the Commission sent the Dueys a letter responding that it received the Surface Water Use Permit Application. The letter stated that the ‘Īao Aquifer system had been designated a groundwater management area and that water use permits pertained only to groundwater withdrawals.

On January 24, 2005, the Dueys filed an incomplete Stream Diversion Works Permit application for 86,400 gpd.

On February 1, 2005, the Commission returned the 2005 application as incomplete and requested further information (**Exhibit 3**), including but not limited to:

1. A current TMK map of parcel 003. The TMK map on file did not show this parcel;
2. A vicinity map;
3. A detailed scale drawing of the intake structure and property boundary lines. The map submitted was not legible;
4. Explain how the water demand estimate of 86,400 gpd was calculated and whether the diversion exceeded the stream flow at the point of the diversion. A 6-inch pipe has the capacity to divert about 1.1 million gallons per day (mgd).
5. It was staff’s understanding that the Dueys claimed to be using a Declaration of Water Use dated 1989, registered to Manuel G. Duarte [REG.134.6]. The Duarte’s registration was in the amount of 28,800 gpd. However, the location of the Declared Water Use was on parcel 002 located downstream of the Dueys’ property;
6. Provide documentation from the Army Corps of Engineers regarding their requirements, if any;
7. Instructions to file an amendment to the interim instream flow standard per the increase in water use, per above.

On December 6, 2006, Earthjustice, representing Hui/MTF filed a petition requesting that the Commission designate the Nā Wai ‘Ehā a Surface Water Management Area.

On April 30, 2008, Nā Wai ‘Ehā was designated a Surface Water Management Area, which included the location of the alleged stream diversion.

On April 23, 2009, in response to the area becoming a Surface Water Management Area, the Dueys submitted two Surface Water Use Permit Applications (SWUPA.2243.6 for 26,600 gpd for existing uses and SWUPA.2244.6 for 383,400 gpd for new uses). The applications stated that the Dueys were accessing stream water on April 30, 2008, yet no Stream Diversion Works Permit is on file with the Commission.

In April 2014, the Interim Instream Flow Standards (IIFS) for Wailuku River was established by mediated settlement. The volumes are 10 million gallons per day (mgd) with provisions for low-flows at Kepaniwai Park located above the alleged diversion, and 5 mgd at or near the mouth of the stream.

On May 1, 2015, the Dueys filed another incomplete Stream Diversion Works Permit application in the amount of 26,600 gpd stating that 22,000 gpd is returned to the stream. However, the previous and still applicable information requested by staff in 2005 were not addressed and the filing fee was not attached.

On Feb. 5, 2016, as part of the Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Management Areas (Case No. CCH-MAI5-01), the Dueys submitted an Opening Brief requesting 1,451,700 gpd for new and existing uses.

On March 9, 2016, the Dueys were issued a written Notice of Alleged Violation for having a stream diversion works without a permit. The letter stated that the Dueys were to inform the Commission on how they intended to resolve the matter and were given until April 8, 2016 to respond.

On March 16, 2016, CWRM staff met with representatives of Earthjustice and UH Law School to discuss the Notice of Alleged Violation, the incomplete Stream Diversions Works Permit Application, and steps to resolve the alleged violation. Discussion points included inconsistent lengths of pipe in the application, clarification on the amount of water requested (270,000 gpd, 86,400 gpd, and 26,600 gpd) as stated on previous incomplete applications; a base map and simple as-built drawings; and interim instream flow standards relevant to the application.

On March 16, 2016, staff created a base map and emailed it to Mr. Duey requesting that he locate the intake and auwai back to the stream and provide as-built drawings of the system.

On April 8, 2016, the Commission received no response from the Dueys regarding the Notice of Violation information requirements necessary to complete their application.

On April 27, 2016, an email was sent by staff reminding Mr. Duey of the Notice of Alleged Violation information requirements and that the matter would be scheduled before the Commission.

On May 3, 2016, the Dueys responded via email to the remaining information requirements to complete the permit application.

AGENCY REVIEW COMMENTS:

County of Maui, Planning Department: Not subject to our regulatory authority and permit.

Dept. of Hawaiian Home Lands: DHHL has 61 acres located near the mouth of the stream. Water is provided to their subdivision by the County Department of Water Supply. DHHL supports the Dueys' application.

Dept. of Land and Natural Resources (DLNR), Aquatic Resources: No objections.

DLNR, Engineering: No objections.

DLNR, Forestry and Wildlife: No objections.

DLNR, Historic Preservation: No response.

DLNR, Land Division: No response.

DLNR, State Parks: No comments.

Dept. of Health (DOH), Clean Water Branch:

1. Any project and its potential impacts to State waters must meet the following criteria:
 - a. Antidegradation policy (HAR, §11-54-1.1) requires that the existing uses and the level of water quality necessary to protect the existing uses of the receiving State water be maintained and protected;
 - b. Designated uses (HAR, §11-54-3) as determined by the classification of the receiving State waters; and
 - c. Water quality criteria (HAR, §11-54-4 through §11-54-8).
2. Hooululahui LLC may be required to obtain National Pollutant Discharge Elimination System (NPDES) permit coverage for discharges of wastewater, including storm water runoff, into State surface waters (HAR, chapter 11-55).

For NPDES general permit coverage, a Notice of Intent (NOI) form must be submitted at least 30 calendar days before the commencement of the discharge. An application for a NPDES individual permit must be submitted at least 180 calendar days before the commencement of the discharge. To request NPDES permit coverage, your applicant must submit the applicable form ("CWB Individual NPDES Form" or "CWB NOI Form") through the e-Permitting Portal and the hard copy certification statement with the respective filing fee (\$1,000 for an individual NPDES permit or \$500 for a Notice of General Permit Coverage). Please open the e-Permitting Portal website located at: <https://eha-cloud.doh.hawaii.gov/epermit/>. Your applicant will be asked to do a one-time registration to obtain a login and password. After registering, click on the Application finder tool and locate the appropriate form. Follow the instructions to complete and submit the form.

3. If the project involves work in, over, or under waters of the United States, it is recommended that Hooululahui LLC contact the Army Corp of Engineers, Regulatory Branch regarding their permit requirements.

Pursuant to Federal Water Pollution Control Act [“Clean Water Act” (CWA)], Paragraph 401(a)(1), a Section 401 Water Quality Certification (WQC) is required for “[a]ny applicant for Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters. . .” The term “discharge” is defined in CWA, Subsections 502(16), 502(12), and 502(6); Title 40 of the Code of Federal Regulations, Sec. 122.2; and HAR, Ch. 11-54.

4. Please note that all discharges related to the project construction or operation activities, whether or not NPDES permit coverage and/or Section 401 WQC are required, must comply with the State’s Water Quality Standards. Noncompliance with water quality requirements contained in HAR, Ch. 11-54, and/or permitting requirements, specified in HAR, Ch. 11-55, may be subject to penalties of \$25,000 per day per violation.
5. It is the State’s position that all projects must reduce, reuse, and recycle to protect, restore, and sustain water quality and beneficial uses of State waters. Project planning should:
 - a. Treat storm water as a resource to be protected by integrating it into project planning and permitting.
 - b. Clearly articulate the State’s position on water quality and the beneficial uses of State waters.
 - c. Consider storm water Best Management Practice approaches that minimize the use of potable water for irrigation through storm water storage and reuse, percolate storm water to recharge groundwater to revitalize natural hydrology, and treat storm water which is to be discharged.
 - d. Consider the use of green building practices, such as pervious pavement and landscaping with native vegetation, to improve water quality by reducing excessive runoff and the need for excessive fertilization, respectively.
 - e. Identify opportunities for retrofitting or bio-engineering existing storm water infrastructure to restore ecological function while maintaining, or even enhancing, hydraulic capacity. Particular consideration should be given to areas prone to flooding, or where the infrastructure is aged and will need to be rehabilitated.

Staff: The lead agency for the protection of water quality is the Department of Health, Clean Water Branch, which administers the Federal Clean Water Act (33 U.S.C. §1251 et seq.), the State Water Pollution Act (HRS Ch. 342D; HAR Ch. 11-54 Water Quality Standards, and HAR Ch. 11-55 Water Pollution Control). HAR §11-54-1 through §11-54-8 defines Best Management Practices, water quality criteria applicable to inland and nearshore waters and is based on the Federal Clean Water Act. HAR Ch. 11-55 Appendix C defines discharges of storm water associated with construction activity.

Office of Hawaiian Affairs: No response.

US Army Corps of Engineers: Based on our review of the information you furnished, and assuming your project is conducted only as set forth in the information provided, this office has determined the proposed activity does not affect the course, capacity, condition, or location of a Navigable Water of the U.S. as defined by Section 10 of the Rivers and Harbors Act of 1899 and would not result in the discharge of dredged or fill material into waters of the U.S. as defined by Section 404 of the Clean Water Act. Therefore, a Department of the Army permit will not be required.

US Fish and Wildlife Service: No objections.

HRS CHAPTER 343, ENVIRONMENTAL ASSESSMENT:

Office of Environmental Quality Control: This action did not trigger an environmental assessment pursuant to HRS §343-5(a).

LEGAL AUTHORITIES

Water as a Public Trust. Under the public trust and HRS §174C, there is an inherent presumption in favor of the four public trust purposes, yet allowing for use and development in a reasonable and beneficial manner. The state water resources trust thus embodies a dual mandate of protection and maximum reasonable and beneficial use. The four public trust purposes are:

1. Maintenance of waters in their natural state;
2. Domestic water use of the general public, particularly drinking water;
3. The exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights; and
4. Dept. of Hawaiian Home Lands water reservation. In *Re Water Use Permit Applications*, 94 Haw. 97, 9 P.3d 409 (2000); and *Waiola O Molokai, Inc.*, 103 Haw. 401, 83 P.3d 664 (2004).

HRS §174C-15 Penalties and common law remedies. Provides for fines of up to \$5,000 for violation of any provision of HRS §174C. For a continuing offense, each day during which the offense is committed is a separate violation.

HRS §174C-71 Protection of instream uses. The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall:

- (1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State;
 - (A) The commission, on its own motion, may determine that the public interest in the waters of the State requires the establishment of an instream flow standard for streams;
 - (B) In acting upon the establishment of instream flow standards, the commission shall set forth in writing its conclusion that the public interest does or does not require, as is appropriate, an instream flow standard to be

- set for the stream, the reasons therefor, and the findings supporting the reasons;
- (C) Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use;
 - (D) Establishment or modification of an instream flow standard shall be initiated by the commission by providing notice of its intention to set an instream flow standard in a newspaper of general circulation published in the vicinity of the stream in question, to the mayor of the appropriate county, and to persons who have previously requested such notice in writing;
 - (E) After giving notice of its intention to set an instream flow standard, the commission or other agencies in participation with the commission shall investigate the stream. During the process of this investigation, the commission shall consult with and consider the recommendations of the department of health, the aquatic biologist of the department of land and natural resources, the natural area reserves system commission, the University of Hawaii cooperative fishery unit, the United States Fish and Wildlife Service, the mayor of the county in which the stream is located, and other agencies having interest in or information on the stream, and may consult with and consider the recommendations of persons having interest in or information on the stream. In formulating the proposed standard, the commission shall weigh the importance of the present or potential uses of water from the stream for noninstream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution;
 - (F) Before adoption of an instream flow standard or modification of an established instream flow standard, the commission shall give notice and hold a hearing on its proposed standard or modification;
- (2) Establish interim instream flow standards;
- (A) Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard;
 - (B) Any interim instream flow standard adopted under this section shall terminate upon the establishment of a permanent instream flow standard for the stream on which the interim standards were adopted;
 - (C) A petition to adopt an interim instream flow standard under this section shall set forth data and information concerning the need to protect and

- conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission;
- (D) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses;
 - (E) The commission shall grant or reject a petition to adopt an interim instream flow standard under this section within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner and subject to the approval of the commission;
 - (F) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area;

HRS §174C-93 Permits for construction or alteration. No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission.

HAR §13-168-2 Definitions.

“Stream diversion” means the act of diverting, pumping or otherwise removing water from a stream into a channel, ditch, pipeline, or other conduit.

“Stream diversion works” means any artificial structure, excavation, pipeline, or other conduit constructed singly or in combination, for the purpose of diverting or otherwise removing water from a stream into a channel, ditch, tunnel, pipeline, etc.

HAR §13-168-3 Penalties. (a) Any person who violates any provision of this chapter or any permit condition or who fails to comply with any order of the commission may be subject to a fine imposed by the commission. Such fine shall not exceed \$1,000 per violation. For a continuing offense, each day’s continuance is a separate violation.

HAR §13-168-32 Stream diversion permits. (a) No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a stream diversion permit from the commission...

(d) In reviewing an application for a permit, the commission shall cooperate with persons having direct interest in the stream diversion works and be guided by the following general considerations:

- (1) The quantity and quality of the stream water or the stream ecology shall not be adversely affected.
- (2) Where instream flow standards or interim instream flow standards have been established pursuant to chapter 13-169, no permit should be granted for any diversion works which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses, as expressed in the standards.

- (3) The proposed diversion works shall not interfere substantially and materially with existing instream or noninstream uses or with diversion works previously permitted.

HAR §13-169-2 Definitions. As used in this chapter, unless the context otherwise requires:

“Instream flow standard” or “permanent instream flow standard” means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect aquatic life, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.

“Interim instream flow standard” means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.

HAR §13-169-36 Modifying instream flow standards. The modification of an existing instream flow standard by the commission may be initiated by the commission or by a petition to the commission by any interested person. The petition for modifying instream flow standards shall be made on forms provided by the department. The procedure for modifying an existing instream flow standard shall be similar to that for the establishment of an instream flow standard; provided that insubstantial modification may be determined and authorized without notice or hearing by the commission and provided, further, that the commission shall hold a hearing upon the written request of any person adversely affected by such order. (emphasis added).

HAR §13-169-48 Interim instream flow standard for West Maui. The Interim Instream Flow Standard for all streams on West Maui, as adopted by the commission on water resource management on October 19, 1988, shall be that amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted offstream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard. (Eff. Dec. 10, 1988).

HAR §13-169-50 Permit required. (a) Stream channels shall be protected from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. No stream channel shall be altered until an application for a permit to undertake the work has been filed and a permit is issued by the commission;

STAFF REVIEW

HAR §13-168-32(d) set out the general criteria for ruling on Stream Diversion Works Permit applications:

1. The quantity and quality of the stream water or the stream ecology shall not be adversely affected.

Staff: According to the USGS Gage No. 1660450, located above the existing Wailuku Water Company's (WWC) diversions, the range of annual mean daily discharge of the Wailuku River from 1983 - 2015 was between 25 - 60 mgd.

However, staff believes the correct standard of review is the 2014 interim instream flow standards mediated settlement. The agreed upon IIFS is 10 mgd with provisions for low-flows at Kepaniwai Park located above the alleged diversion, and 5 mgd at or near the mouth of the stream. As part of the settlement, the Commission installed a gage at Kepaniwai Park (CWRM Gage 6-85). The mean daily flow from 2014 -2016 is 42 mgd. The Q50 (median daily flow) is 25 mgd. The IIFS is 10 mgd. The 26,600 gpd requested amount is less than 1% of the IIFS and considered within the stream's natural variability.

The baseflow is the amount of water entering the stream from groundwater and is a general guideline for the minimal amount of streamflow needed for fish habitat. An estimation for baseflow is Q70 which is about 14 mgd. The diverted amount (26,600 gpd) will not reduce the flow below the Q70.

Therefore, staff estimates that the quantity or quality of stream water or stream ecology is not adversely affected.

2. Where instream flow standards or interim instream flow standards have been established pursuant to HAR §13-169, no permit should be granted for any diversion works which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses, as expressed in the standards.

Staff: In 2014, the interim instream flow standards for the Wailuku River was established at 10 mgd with provisions for low-flows at Kepaniwai Park and 5 mgd at or near the mouth of the stream located below the diversion.

It is estimated that the requested amount of 26,600 gpd, with a return flow of 22,000 gpd, will not affect the 5 mgd interim instream flow standard established at or near the mouth of the stream. Staff recommends that the 26,600 gpd be considered an insubstantial modification of the IIFS (HAR §13-169-36). Therefore, a Petition to Amend Instream Flow Standard is not required.

3. The proposed diversion works shall not interfere substantially and materially with existing instream or non-instream uses or with diversion works previously permitted.

Staff: There is one existing Surface Water Use Permit application that gets water from spring flow located near the mouth of the stream identified as SWUPA.2275.6 in the amount of 4,200 gpd. There are four new Surface Water Use Permit applications SWUPA.2370.6 (407,667 gpd); SWUPA.2360.6 (540,000 gpd); SWUPA.3623.6 (105,766 gpd); and SWUPA.2244.6 (383,400 gpd) for a total of 1.4 mgd. The Surface Water Use Permit Applications are part of the Na Wai Eha contested case hearing and will be decided in that venue. Hawaiian Commercial and Sugar Co. (HC&S) currently maintains the Spreckels Ditch diversion approximately 2.0 miles downstream of the Duey diversion. HC&S modified the Spreckels Ditch diversion in 2015 to meet the IIFS of 5 mgd at the mouth Wailuku River. The Duey diversion is

not expected to interfere with other diversions works previously permitted on Wailuku River.

ADMINISTRATIVE AND CIVIL PENALTY GUIDELINE (G14-01)

On October 1, 2014, the Commission approved its Administrative and Civil Penalty Guideline (G14-01) to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement cases. The goals are to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement actions by:

- a) Deterring violations;
- b) Removing the economic benefit of violations;
- c) Provide fair treatment of the regulated community; and
- d) Offer the violator a chance to undertake a beneficial alternative, under proper conditions, in a partial or total replacement of a cash penalty.

1. Alleged Violation: Stream Diversion Works Construction Without a Permit

Initial Staff Administrative Fee

On March 9, 2016, Duey was issued a written Notice of Alleged Violation. Per Administrative and Civil Penalty Guideline (G14-01), an administrative fee of \$500 shall be assessed when there is a written Notice of Alleged Violation.

Penalty Calculation Method

A. Initial Minimum Penalty.

1. Finding of Violation. \$250 day/incident

Staff: No complete Stream Diversion Works Permit on file.

2. Occurring in a Water Management Area. \$250 day/incident

Staff: Not applicable. The Dueys filed an incomplete Stream Diversion Works Permit application in 2005, prior to the hydrologic unit becoming a Water Management Area.

3. Repeat Violation. \$250 day/incident

Staff: Not applicable, no previous violations.

B. Adjustments to Initial Minimum Penalty: Mitigative and Gravity Factors.

Reduction or enhancement of any recommended fine will be made based on: (1) the degree of risk or actual harm to water resources or the environment and (2) specific

factors listed below. Where the risk or actual harm is slight, reduction of the recommended fine should be considered and where the risk or actual harm is great, enhancement of the recommended fine should be imposed.

1. Mitigation Component.

Mitigative factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more mitigative factors can reduce or eliminate the fine or alternative penalty recommendation. Mitigative factors include but are not limited to:

a. Insignificant impact on the resource.

Staff: Diverting 26,600 gpd, while returning 22,000 gpd, is recommended as an insubstantial modification of the interim instream flow standard.

b. Attempt to remedy the violation.

Staff: See Item 2c below.

c. Good faith effort to remedy violation once noticed.

Staff: See Item 2e below.

d. Self reporting in a timely manner.

Staff: Not applicable.

e. Diligent and speedy effort to remedy the violation once noticed.

Staff: See Item 2e below.

2. Gravity Component.

Gravity factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more gravity factors can enhance the fine or alternative penalty recommendation. Gravity factors include but are not limited to:

a. Significant risk of or actual damage or harm to the water resources or the environment.

Staff: Not applicable, no known harm or damage to the resource.

b. Multiple or repeat violations of the code or regulations.

Staff: Not applicable.

- c. Evidence that the violator should have known about the violation.

Staff: Over a 12-year time span, Commission staff contacted the Dueys regarding the need for a permit, including many phone and in-person discussions with the applicant and his representatives.

Hui o Nā Wai 'Ehā is a party in numerous proceedings before the Commission. Mr. Duey, as President of the Hui, is well aware of Water Code requirements regarding permit requirements in Water Management and non-Water Management Areas.

- d. Refusal to correct the violation once noticed.

Staff: The applicant took 12 years to complete the permit application.

- e. Failure to meet deadlines as set by the Commission or its staff.

Staff: The Notice of Alleged Violation, dated March 9, 2016, warned the Dueys that if they failed to contact the Commission within 30 days, that the intent was to schedule this case before the Commission for final disposition.

No response was received by the 30-day deadline (April 8, 2016). The Dueys responded only after staff emailed a reminder of the Notice of Alleged Violation and a copy of the Civil Penalty Guideline on April 27, 2016.

C. Calculation of the Number of Days for the Recommended Fine.

- 1. If one or more of the gravity components are met, a daily fine may be imposed. Those fines shall accrue on the following basis:

- a. Violation where no permit is issued and no prior permits have been issued or no permit is required.

Staff: The 30-day deadline to respond to the Notice of Alleged Violation was not met.

- b. Violation where no permit is issued but prior permits have been issued.

Staff: Not applicable.

- c. Violation where permit has been issued. Either:

- a. The date the violation has occurred.
- b. The date of permit approval.
- c. The date permit issued.
- d. The date of Commission meeting for conditions or deadlines imposed by the Commission not contained in a permit.

Staff: Not applicable.

- d. Tolling. In calculating a recommendation for the imposition of a daily fine, the time may be tolled upon the filing of a permit application, satisfactory progress in addressing the violation, or for good cause.

Staff: The 30-day deadline to respond to the Notice of Alleged Violation was not met.

- e. End. In calculating a recommendation for the imposition of a daily fine, the period of the violation ends upon: (1) satisfactory resolution of the violation, or (2) removal or remedy of the violation.

Staff: Staff received information via email (dated May 3, 2016) sufficient to complete the current application. As part of that email, Mr. Duey referenced the 2014 mediated settlement/stipulation and requested to add new uses of 383,400 gpd onto the current application. The Dueys provided no explanation how a mediated settlement between parties in an interim instream flow standard dispute overrules HRS §174C-93 which states that “no person shall construct or alter a stream diversion works without first obtaining a permit from the commission.” Therefore, the additional amount will not be considered.

New uses will be taken up in the current contested case hearing CCH-MA15-01 Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao and Waikapu Streams, Maui.

- D. No staff recommendation shall exceed the maximum amount allowable in Section 174C-15, HRS.

Summary of Total Recommended Fines – Stream Diversion Works Without a Permit

Description	Penalty Calculation Method	Amount (\$)
Administrative Fee:		500
Initial Minimum Penalty:		
Finding of Violation	\$250 day/incident x 16 days 30-day NOV deadline ended April 8, 2016 Application complete on May 3, 2016	4,000
Occurring in a Water Management	\$250 day/incident	Not applicable

Area		
Repeat Violation	\$250 day/incident	Not applicable
Duration	16 days	
TOTAL		4,500

ALTERNATIVE SETTLEMENT

The following considerations will guide the Commission's staff recommendation in deciding whether to allow a project to substitute for or be credited against a cash penalty. However, any finding of a violation by the Commission shall result in a minimum one time \$500 cash fine in addition to an alternative settlement. Failure to successfully meet the alternative will result in re-institution of the fines as calculated in the penalty calculation method above.

1. The project must be something that the violator was not required to do anyway, either because of legal or other obligation. Projects committed to, or started before a settlement is finally agreed upon may be eligible for credit, but such projects must be carefully examined to determine the extent to which they resulted from the enforcement case or were due to other factors, or prior plans or commitments. In some cases, partial credit may be appropriate.
2. The project must result in new water resources (including aquatic biota) information, provide water resources education, or benefit the water resources of the state.
3. The project may consist of corrective-action to be completed within a timeframe established by the Commission. Failure to abide by the timeframe will result in re-institution of the fines as calculated in the penalty calculation method above.

FUTURE APPLICATIONS

Future applications from an applicant who has not paid fines or met alternative settlements or for a project with outstanding violations may be considered incomplete until sanctions are fulfilled and/or violations are corrected.

RECOMMENDATION

That the Commission:

1. Find that the Landowner, Hooululahui LLC, c/o John and Rose Marie Duey, violated Section 174C-93, Hawaii Revised Statutes (HRS), and Section 13-168-32, Hawaii Administrative Rules (HAR), by installing a stream diversion works without a permit;
2. Issue administrative and civil penalties of \$4,500 against the Landowner pursuant to HRS §174C-15, HAR §13-168-3, and Administrative and Civil Penalty Guideline (G14-01) payable within 30 days;
3. Find that 26,600 gallons per day (gpd), being less than 1% of the mediated interim instream flow standard dated April 17, 2014, is considered an insubstantial modification.

Therefore, a Petition to Amend Instream Flow Standard is not required under HRS §174C-71 and HAR §13-169-36;

4. Approve a Stream Diversion Works Permit (SDWP.4175.6) Application for a stream diversion works for driscoll and pvc piping diverting 26,600 gpd of water for existing domestic uses and less than 2 acres of diversified agriculture and taro while returning 22,000 gpd back to the Wailuku River;
5. Exempt the Stream Diversion Works Permit (SDWP.4175.6) from standard permit conditions nos. 4, 5, and 6 (**See Exhibit 4**);
6. Issue a written warning to Mr. and Mrs. Duey indicating any future violations involving a stream diversion without the necessary permits may be considered repeat violations with fines up to \$1,000 for each day of violation; and
7. Suspend any current, pending or future applications by the applicant until the fines are paid and the applicant completes the stream diversion works permit process.

Respectfully submitted,



JEFFREY T. PEARSON, P.E.
Deputy Director

Exhibits:

1. Location: Tax Map Key of Landowner: (2) 3-5-003:018.
2. Six-inch pipe intake on TMK (2) 3-5-003:018.
3. Letter from the Commission on Water Resource Management dated February 1, 2005.
4. Standard Stream Channel Alteration Permit and Stream Diversion Works Permit Conditions.

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

Location: Tax Map Key of Landowner: (2) 3-5-003:018.

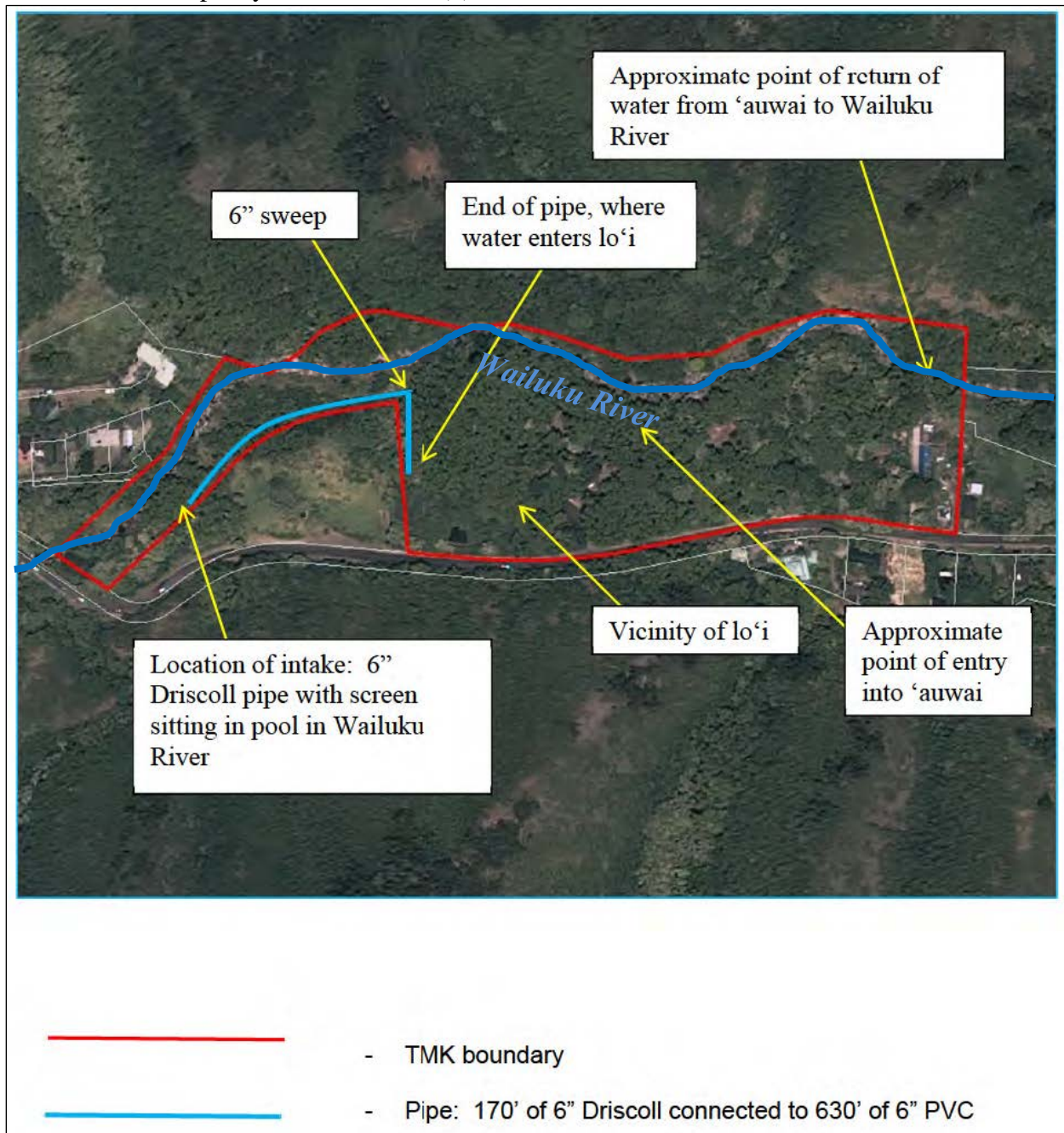


EXHIBIT 1

Six-inch pipe on TMK (2) 3-5-003:018.





August 16, 2016

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON

MEREDITH J. CHING
CLAYTON W. DELA CRUZ
JAMES A. FRAZIER
CHIYOME L. FUKINO, M.D.
LAWRENCE H. MIKE, M.D., J.D.
STEPHANIE A. WHALEN

YVONNE Y. IZU
DEPUTY DIRECTOR

FEB - 1 2005

Ms. Rose Marie H. Duey
575-A Iao Valley Road
Wailuku, Hawaii 96793

Dear Ms. Duey:

Thank you for your application for a stream channel alteration and stream diversion works permit for a stream diversion on TMK Parcel 3-5-003:003 Iao Stream, Wailuku, Maui.

On June 25, 2004, Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., through Earthjustice, filed a Petition to Amend the Interim Instream Flow Standards for Waihee, North & South Waiehu, Iao, and Waikapu Streams and Their Tributaries (Petition).

On October 19, 2004, Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., through Earthjustice, filed a CITIZEN COMPLAINT AGAINST WAILUKU AGRIBUSINESS CO., INC. AND HAWAIIAN COMMERCIAL & SUGAR COMPANY AND PETITION FOR DECLARATORY ORDER TO IMMEDIATELY CEASE WASTING WATER DIVERTED FROM WAIHEE, NORTH & SOUTH WAIIEHU, IAO, AND WAIKAPU STREAMS AND THEIR TRIBUTARIES.

Because the above Petition, Citizen Complaint, and Petition for Declaratory Order include Iao Stream, as does your application, and because there is a pending application for a stream permit on Waikapu Stream, we will take these related matters to the Commission at the same time.

Regarding your application. Before we can begin to accept and process your application, we request that you provide the following information, to the best of your ability:

1. Current Tax Map Key 3-5-03:003. (see Part A-4)
2. Vicinity map. (example enclosed)
3. Detailed scale drawings of the intake structure for the system with respect to property boundaries. (see B-3 c.,d.)
4. Cost of installing a municipal water line as opposed to the cost of the proposed diversion. (see B-4)
5. Please explain how the water demand estimate of 60 gallons per minute was calculated? Also, please address whether the proposed 60 gallons per minute diversion exceeds the stream flow in Iao Channel at the point of your proposed diversion. (see C-14)

EXHIBIT 3

August 16, 2016

Ms. Rose Marie H. Duey
Page 2

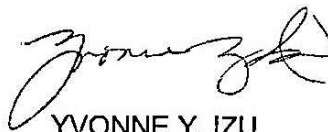
6. In addition to the lo'i' kalo, banana, breadfruit, and native plants, will there be additional irrigation uses such as for lawns? If so, what will be the reduction in stream flow during seasonally low flow periods, between the intake and the discharge considering all irrigation and evapotranspiration? (see C-13-(f))
7. Provide documentation from the U. S. Army Corps of Engineers indicating the project is not subject to a Corps permit. (see A-3a)
8. If you are claiming an appurtenant water right please provide the appropriate documentation with your application. (see attached)
9. Please fill out the required information indicating you are the applicant, (top left corner of the application form) and the "Diversion Works Owner portion of the form. (bottom left corner of the form)
10. The copy of the exhibit showing the diagram of the diversion and irrigation system is not legible. Please try to improve the copy quality:

In addition to the above, it is our understanding that you propose to divert more water than was declared prior to the Commission's adoption of the interim instream flow standard for West Maui by the former occupant, Mr. Manuel Duarte. Our records show that Mr. Duarte diverted approximately 20 gallons per minute. You propose to expand the diversion to 60 gallons per minute. The proposal to expand the diversion will require an amendment of the interim instream flow standard (HAR §13-169-48). A form for petitioning to amend the interim instream flow standard is enclosed for your use. Please complete the information and submit the appropriate documentation with your application.

We are returning your application and check for \$25.00 (Check 4242). When you resubmit your application with the above information you will need to submit a filing fee in the form of a check for \$75.00, payable to the Department of Land and Natural Resources (\$25.00 per application). You will also need to submit 14 copies of your application.

Thank you for your application. If you have any questions regarding this letter, please call David Higa at 587-0249.

Sincerely,



YVONNE Y. IZU
Deputy Director

c. Earthjustice

STANDARD STREAM CHANNEL ALTERATION PERMIT AND
STREAM DIVERSION WORKS PERMIT CONDITIONS

1. The permit application and staff submittal approved by the Commission at its meeting on the above date shall be incorporated herein by reference.
2. The project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways. The permittee shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments.
3. The permittee, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the applicant or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The permittee shall notify the Commission, by letter, of the actual dates of project initiation and completion. The applicant shall submit a set of as-built plans and photos in electronic format of the completed work to the Commission upon completion of this project. This permit may be revoked if work is not started within six (6) months after the date of approval or if work is suspended or abandoned for six (6) months, unless otherwise specified. The proposed work under this permit shall be completed within two (2) years from the date of permit approval, unless otherwise specified. The permit may be extended by the Commission upon showing of good cause and good-faith performance. A request to extend the permit shall be submitted to the Commission no later than three (3) months prior to the date the permit expires. If the commencement or completion date is not met, the Commission may revoke the permit after giving the permittee notice of the proposed action and an opportunity to be heard.
5. Before proceeding with any work authorized by the Commission, the permittee shall submit one set of construction plans and specifications in electronic format to determine consistency with the conditions of the permit and the declarations set forth in the permit application.
6. The permittee shall implement site-specific, construction Best Management Practices (BMPs) in consultation with the Department of Health's Clean Water Branch and other agencies as applicable, that are designed, implemented, operated, and maintained by the permittee and its contractor to properly isolate and confine construction activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting State waters per HRS Ch. 342D Water Pollution; HAR §11-54-1 through §11-54-8 Water Quality Standards; and HAR Ch. 11-55 Water Pollution Control, Appendix C. BMPs shall control erosion and dust during construction and schedule construction activities during periods of low stream flow.
7. The permittee shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The applicant shall plant or cover lands denuded of vegetation as quickly as possible to prevent erosion and use native plant species common to riparian environments to improve the habitat quality of the stream environment.
8. In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the applicant shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.